U.S. Department of Justice

United States Attorney
Southern District of New York

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December 6, 2019

BY ECF AND ELECTRONIC MAIL (chambersnysdseibel@nysd.uscourts.gov)

The Honorable Cathy Seibel
United States District Judge
300 Quarropas Street, Chambers 633
White Plains, NY 10601-4150

Re: *Cannistra Realty LLC v. U.S. EPA, et al.*, No. 19 Civ. 3558 (CS)

Dear Judge Seibel:

I write in response to the request for a pre-motion conference filed by Cannistra Realty LLC, regarding the requested deposition of EPA official Angela Carpenter, Dkt. No. 43, and to request that, in order to efficiently decide related discovery disputes, the conference on December 13, 2019, also be treated as a pre-motion conference regarding seven other requested depositions of EPA employees, contractors, and subcontractor environmental workers.[1]

This case presents two potential threshold issues prior to the assessment of a civil penalty for non-compliance with EPA's administrative access order. The first question is whether EPA validly issued its order. As discussed below, this question is reviewed under the deferential "arbitrary and capricious" standard set forth in the Administrative Procedure Act ("APA") and, as such, is subject to review only on the administrative record. In contrast, the second threshold question—whether Cannistra "unreasonably fail[ed]" to comply with EPA's valid order, 42 U.S.C. § 9604(e)(5)(2)(B)—is subject to discovery and fact-finding by the Court.

The Government respectfully requests that the Court quash Cannistra's request to depose Ms. Carpenter as inconsistent with the APA's administrative record rule, and quash Cannistra's requests to depose the environmental workers as irrelevant, as well as duplicative and disproportionate to the likely benefit.

Background

As the Court is aware, starting in May 2018, EPA sought access to Cannistra's property at 115 and 125 Kisco Avenue, Mount Kisco, New York, in order to sample for radiological contamination and to determine whether there had been a release or threatened release of

[1] The Court's Order directing a response from the Government limited the Government to a letter of three pages. Given that this letter is not only a response, but also a separate pre-motion conference request, the Government respectfully requests that the Court consider this submission of four pages.

hazardous substances impacting the property and/or the public. From May 2018 to April 2019, EPA employees communicated with Cannistra representatives about when EPA could access the property to perform necessary testing, and Cannistra asserted a series of changing terms that it required be met before allowing EPA access. Specifically, among other conditions, Cannistra demanded that EPA indemnify Cannistra and its tenant, Tesla; that EPA's contractor provide worker's compensation insurance and business interruption insurance coverage; and that EPA be limited to working only during Tesla's non-business hours (acknowledging that Tesla operates seven days a week for extended hours, meaning that most of EPA's work would have to be performed at night). Pursuant to regulation, EPA construed these conditions to providing access as a denial of consent to access the property. 40 C.F.R. § 300.400(d)(4)(i).

On March 12, 2019, EPA issued an order (the "Administrative Order") under Section 104(e)(5) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9604(e)(5). The Administrative Order was signed by Angela Carpenter, the Acting Director of the Superfund and Emergency Management Division ("SEMD") (then known as the Emergency and Remedial Response Division) for EPA, Region 2. Pursuant to terms of the Administrative Order, Cannistra was afforded the opportunity to request a conference to discuss the issuance of the Administrative Order prior to it becoming effective. EPA attorney Gerald Burke held such a conference with Cannistra, at its request, at which Cannistra continued to condition access on EPA performing its sampling work at night. Following the conference, Mr. Burke consulted with Ms. Carpenter, and she determined that no modifications to the Administrative Order were necessary or appropriate. On April 17, 2019, the Administrative Order went into effect.

Deposition of Angela Carpenter

Ms. Carpenter was the authorized official who executed the Administrative Order and thereafter determined that the concerns raised by Cannistra at the conference did not warrant modification of the Order.[2] As stated above, the issuance of the Administrative Order is subject to review, pursuant to the APA, as part of Cannistra's defense to EPA's counterclaims. *See* 5 U.S.C. § 703 ("[A]gency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."). In such a review, the Court applies the APA's deferential standard of review, which, as relevant here, asks whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A). That review is limited to the administrative record. *Id.* § 706 ("[T]he court shall review the whole record . . . "); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court."); *Nat'l Audubon Society v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (review generally confined to administrative record). The rare exceptions to the "record rule," applying when a party has made a strong showing of agency bad faith or incompleteness of the record, are not present or applicable here. *Nat'l Audubon Society*, 132 F.3d at 14-15.

[2] Ms. Carpenter had no direct contact with Cannistra.

Cannistra seeks to depose Ms. Carpenter because of her "personal involvement," which consisted of having "signed the Administrative Order directing Cannistra to provide the EPA with unconditional access, without any of the accommodations that Cannistra had requested from the EPA to mitigate its concerns about business disruption and safety." Dkt. No. 43, at 1. Whether Ms. Carpenter properly issued the Administrative Order, notwithstanding Cannistra's objections, is exactly the question governed by the APA, and review of that action is limited to the administrative record; that is, the Court can determine whether Ms. Carpenter's decision was arbitrary or capricious given Cannistra's objections. Ms. Carpenter's testimony is not relevant to Cannistra's discovery objective: inquiring into whether Cannistra's own failure to comply with the Administrative Order was "unreasonable." Deposing Ms. Carpenter is therefore not permitted.

Depositions of Seven Individuals Who Performed Work At or Regarding the Property

Cannistra also seeks to depose seven environmental workers who performed work related to the property after Cannistra ultimately agreed to provide EPA with access on terms markedly similar to those EPA previously proposed at the conference with Mr. Burke. These environmental workers include two EPA employees, three EPA contractors (employees of Weston Solutions), and two EPA subcontractors.[3] On December 3, 2019, EPA informed Cannistra of its position that such depositions were not relevant to the case or proportionate to the needs of the case. Cannistra responded that these individuals' "experiences and observations are relevant to whether Cannistra's proposed conditions were reasonable."

[3] Although typically a party would not have standing to challenge the five depositions of non-parties, EPA has standing regarding the subpoenas here because, pursuant to its contract with Weston, EPA is required to pay its contractor and subcontractor for employee time and legal costs related to litigation matters. Although EPA is not aware of a case directly on point, case law provides that a party has standing to challenge a third-party subpoena "to protect a personal privilege or right." A "personal right" has been applied broadly to include, for example, privacy interests. *See Nova Prods., Inc. v. Kisma Video, Inc.*, 220 F.R.D. 238, 241 (S.D.N.Y. 2004) (citing cases). A requirement to bear the witness's costs is an equally direct harm from the subpoena and should be sufficient to provide standing. *Cf. United States v. Raineri*, 670 F.2d 702, 712 (7th Cir. 1982) (party has standing to move to quash non-party subpoena if a "subpoena infringes upon the movant's legitimate interests," including "preventing undue lengthening of the trial, undue harassment of its witness, and prejudicial over-emphasis on [ ] credibility.").

In any event, the Government has spoken to counsel for Weston Solutions and understands that Weston intends to move to quash the subpoenas for the three contractors and one subcontrator that have been subpoenaed. (One subcontractor who resides in New Jersey has not been subpoenaed yet.) Should the Court find that EPA lacks standing to move to quash the non-party subpoenas, EPA respectfully requests that this letter be considered a statement in support of Weston's forthcoming motion.

Cannistra again misunderstands the legal standard. Whether its failure to comply with the Administrative Order was unreasonable turns on Cannistra's conduct and not the actions of the EPA field personnel and contractors who performed work after Cannistra ultimately agreed to provide access. *See, e.g., United States v. Ponderosa Fibres of Am.*, 178 F. Supp. 2d 157, 161-62 (N.D.N.Y. 2001) (rejecting claim of reasonableness in failing to respond to information request under same statutory provision because defendant could not show "how and why it was impeded from complying with" the request). The circumstances surrounding Cannistra's refusal to provide access unless EPA agreed to conditions that EPA had validly rejected is at issue here, and thus discovery going to other, unrelated matters, such as what the field workers observed, is not relevant. (Again, to the extent that the issue is whether EPA's rejection of pre-conditions was valid in the first place, that issue is to be decided on the administrative record and should not be a subject of discovery.)

Cannistra's subjective, good faith or bad faith belief regarding providing access may be relevant to the ultimate assessment of an amount of a civil penalty, but it is irrelevant to the question of whether Cannistra "unreasonably failed" to provide EPA with access. *Ponderosa*, 178 F. Supp. 2d at 162-63 (good faith irrelevant to question of "unreasonable failure"); *United States v. M. Genzale Plating, Inc.*, 807 F. Supp. 937, 939 (E.D.N.Y. 1992) (good faith or bad faith as factor considered in setting penalty amount). In that regard, EPA has not objected to the depositions of Daniel Gaughan, EPA's project manager for the sampling work who had numerous direct communications with Cannistra regarding its concerns, or EPA attorney Gerald Burke, who presided at the conference where Cannistra was afforded an opportunity to reiterate its concerns prior to the Administrative Order becoming effective. These witnesses can speak directly to their observations of and experience with Cannistra, which may bear on the issue of Cannistra's good faith or bad faith. Additionally, the Tesla general manager will be deposed, as well as the owners of Cannistra, who can speak directly as to their beliefs regarding EPA's request for access. But the "experiences and observations" of EPA's field workers, contractors, and subcontractor are not reasonably calculated to uncover evidence of Cannistra's subjective good faith or bad faith with respect to granting access. In any event, the scattershot depositions of seven environmental workers are duplicative and unduly burdensome, and thus not proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

I thank the Court for its consideration of this submission.

Respectfully submitted,

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cc: All Counsel of Record (via ECF)